

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE WESTERN DISTRICT OF TEXAS**
3 **AUSTIN DIVISION**

4 UMG RECORDINGS, INC., CAPITOL RECORDS, LLC,) AU:17-CV-00365-LY
5 WARNER BROS. RECORDS INC., SONY MUSIC)
6 ENTERTAINMENT, ARISTA RECORDS LLC, ARISTA)
7 MUSIC, ATLANTIC RECORDING CORPORATION,)
8 CAPITOL CHRISTIAN MUSIC GROUP, INC., ELEKTRA)
9 ENTERTAINMENT GROUP INC., FONOVISA, INC.,)
10 FUELED BY RAMEN LLC, LAFACE RECORDS LLC,)
11 NONE SUCH RECORDS INC., RHINO ENTERTAINMENT)
12 COMPANY, ROADRUNNER RECORDS, INC.,)
13 ROC-A-FELLA RECORDS, LLC, TOOTH & NAIL, LLC,)
14 ZOMBA RECORDING LLC,)
15)
16 Plaintiffs,)
17)
18 v.) AUSTIN, TEXAS
19)
20 GRANDE COMMUNICATIONS NETWORKS LLC,)
21 PATRIOT MEDIA CONSULTING, LLC,)
22)
23 Defendants.) JANUARY 3, 2018
24

25 *****
14 TRANSCRIPT OF INITIAL PRETRIAL CONFERENCE
15 BEFORE THE HONORABLE LEE YEAKEL
16 *****

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Proceedings recorded by computerized stenography, transcript
produced by computer.

15:01:52 1 (In chambers)

15:01:52 2 THE COURT: Let's start here at my left, and announce
15:01:54 3 again who you are and who you represent so the court reporter
15:01:57 4 can get you down.

15:01:58 5 MR. BITTING: I'm Dan Bitting. I represent the
15:02:00 6 plaintiffs.

15:02:02 7 MR. O'BEIRNE: Phil O'Beirne, also on behalf of
15:02:06 8 plaintiffs.

15:02:07 9 MR. RAVEL: Steve Ravel for the defendants Grande and
15:02:11 10 Patriot.

15:02:11 11 MR. HOWENSTINE: And Zachary Howenstine, also for
15:02:14 12 defendants.

15:02:18 13 THE COURT: Okay. For those of you haven't been here
15:02:34 14 before and for those of you who have, this is what I call an
15:02:37 15 initial pretrial conference or a scheduling conference. And
15:02:40 16 the most important thing we are going to accomplish in this
15:02:44 17 case today is to get you a date and time for your final
15:02:49 18 pretrial conference and a trial month in which to have your
15:02:53 19 jury trial.

15:02:54 20 And I can do no better than give you a trial month
15:02:58 21 because my civil docket is held hostage by my criminal docket;
15:03:04 22 and until I know what criminal cases I'm going to have to try
15:03:07 23 in any given month, I don't know what dates and times I'm going
15:03:16 24 to have available for my civil docket.

15:03:19 25 But your final pretrial conference will come late in

15:03:21 1 the month before your trial month, and it will come after I
15:03:29 2 have called my criminal docket for your trial month. So, at
15:03:33 3 the absolute latest, I should be able to give you a date and
15:03:36 4 time for your jury trial when you come for your final pretrial
15:03:39 5 conference.

15:03:40 6 In other words, you're not going to be put on what
15:03:42 7 some judges call a trailing docket, where we go into your trial
15:03:46 8 month and you're on 24- or 48-hour call. You will get a
15:03:51 9 specific date and time for your jury trial; it may just come a
15:03:56 10 little late in the hunt. That's not a perfect system, but it's
15:03:59 11 the best I can do with the docket that I have.

15:04:06 12 What it means also is: You and your clients and your
15:04:09 13 witnesses need to know that you have to hold that entire trial
15:04:12 14 month open until I'm able to give you a specific date and time.
15:04:21 15 It will not be grounds for a continuance or a postponement that
15:04:24 16 the month has become inconvenient for you or you have had a
15:04:27 17 client or a witness get out of pocket. So make sure they all
15:04:30 18 understand that.

15:04:31 19 Now, there is a way you can avoid that uncertainty,
15:04:34 20 and that is you can consent to a magistrate judge. And I want
15:04:41 21 all parties to take one of our consent forms that is in the
15:04:43 22 middle of table there.

15:04:46 23 Now, I'm not going to -- I don't lean on the lawyers
15:04:49 24 hard, like some of my colleagues do, to try to force you to
15:04:52 25 consent to a magistrate judge; but what I do require you to do

15:04:55 1 is to discuss this case among yourselves and with your clients.
15:05:02 2 As you know, it takes all parties to consent before I can
15:05:05 3 transfer a case to a magistrate judge for all purposes,
15:05:14 4 including trial and final judgment.

15:05:16 5 What do you get if you consent to a magistrate judge?
15:05:18 6 One, you get the thanks of the Court. I could not get to all
15:05:21 7 of my civil cases if I weren't able to transfer a portion of
15:05:26 8 them to a magistrate judge for all purposes, including trial
15:05:28 9 and judgment.

15:05:31 10 Secondly, you avoid the uncertainty in your trial
15:05:34 11 setting. The magistrate judge can and will give you a
15:05:38 12 specific, discrete date and time for your jury trial that you
15:05:43 13 can rely on just about as quickly as I transfer the case to
15:05:47 14 them. The way that would work is, once I get in consent forms
15:05:54 15 that indicate consent of all parties, I won't sit on the case.
15:05:58 16 I would immediately transfer it to the magistrate judge, who
15:06:01 17 would contact you and would, in consultation with you, come up
15:06:07 18 with a date and time that everybody can live with for your
15:06:10 19 trial.

15:06:12 20 Why can the magistrates do that and I can't do that?
15:06:15 21 Well, one, their dockets are much less complex and lengthy than
15:06:21 22 mine. For instance, the magistrate judges cannot try federal
15:06:25 23 felony cases, which means you are never in any danger of
15:06:28 24 getting bumped by a criminal case if you are before the
15:06:31 25 magistrate. You are always in that danger if you remain in my

15:06:35 1 court even after I give you a specific date and time for trial.
15:06:39 2 If something comes up in a criminal case, I'm just going to
15:06:42 3 have to handle it.

15:06:44 4 Also, by agreement with me, the magistrate judges do
15:06:48 5 not overbook, which means you are not ever going to be in a
15:06:52 6 situation where you are going to get a call saying a case ahead
15:06:55 7 of you on the docket is going to trial and you're not going to
15:06:58 8 be reached.

15:07:01 9 So, if the uncertainty of a trial setting and having
15:07:03 10 to hold an entire month open is a problem for you or your
15:07:07 11 clients, you should consider consenting to a magistrate judge.

15:07:11 12 Also, as you already know -- well, you don't already
15:07:15 13 know. Yeah, you do, because I've referred a couple of motions
15:07:18 14 to a magistrate judge already -- I'm likely to refer all or a
15:07:26 15 portion of your pretrial matters to a magistrate judge just
15:07:33 16 because of the size of my docket. So if you only want to
15:07:35 17 educate one judge, bring one judge up to speed, you might want
15:07:38 18 to consider consenting to a magistrate.

15:07:40 19 And, finally, in spite of what I have told you about
15:07:48 20 my docket, we do a good job of getting to our civil cases in
15:07:52 21 the month in which they are set. So, if you stay in my court,
15:07:55 22 you will be expected to be ready to go trial in the month we
15:07:59 23 put in the scheduling order. It will be almost impossible for
15:08:02 24 you to get a continuance. It creates far too big of a ripple
15:08:05 25 effect through my docket if I start trying to do things with it

15:08:13 1 as we approach the trial month, so I just don't. Again, the
15:08:17 2 magistrate judges are much more flexible than I and would be
15:08:20 3 willing to work with you on a reset or a continuance where I
15:08:22 4 wouldn't.

15:08:25 5 If one or all or any combination of the parties is
15:08:28 6 not going to consent to a magistrate judge, no one needs to
15:08:31 7 notify us of that. I'm going to sign a scheduling order today
15:08:37 8 and, unless and until I get consents from all parties, we are
15:08:40 9 going to proceed in my court under that scheduling order.

15:08:43 10 So, that having been said, the most important date
15:08:55 11 you have in your scheduling order, in spite of the 12(b)
15:08:57 12 motions, is your current dispositive motions deadline. So
15:09:00 13 everything I'm going to say from this point forward is going to
15:09:08 14 be effective, provided this case survives the current round of
15:09:11 15 motions.

15:09:12 16 And I'll say a little bit about dispositive motions,
15:09:18 17 in spite of the fact that there is some of them already filed,
15:09:19 18 is I don't care for dispositive motions. If I could pass one
15:09:22 19 law, it would be to do away with all dispositive motions for
15:09:32 20 all time, and you would either try your case or settle your
15:09:35 21 case. That's the way it used to be done, and I think it was a
15:09:39 22 better system.

15:09:40 23 But, if this case survives the previous round of
15:09:42 24 motions, let me tell you, if you feel compelled to file other
15:09:48 25 dispositive motions, do so only if in your best professional

15:09:56 1 belief there is a strong likelihood it can get granted.

15:10:00 2 Now, one of the reasons I dislike dispositive motions
15:10:02 3 is I get them in every one of my cases. They are the single
15:10:08 4 most time consuming thing that I do. I feel all of you are
15:10:17 5 experienced enough to know that, maybe at the outside, only
15:10:19 6 about half of all cases is there some form, legitimately, of
15:10:23 7 summary relief perhaps available. So, if I'm getting these
15:10:29 8 motions in every one of my cases, it sounds like half of them,
15:10:32 9 if you do the math, are frivolous, and that's certainly been my
15:10:35 10 experience.

15:10:37 11 But, because I get them in all of my cases and
15:10:42 12 because there will be anywhere from a high of maybe 20 to a low
15:10:45 13 of down around 10 civil cases moving along on the same time
15:10:49 14 line you're on, all with dispositive motions, and, because I
15:10:55 15 don't get the luxury my state court colleagues get of being
15:10:58 16 able to just say "granted" or "denied" -- I have to write a
15:11:01 17 complete opinion on a dispositive motion -- they take a good
15:11:08 18 long time to deal with. Also, I do not begin to look at
15:11:12 19 dispositive motions until I get in a response and a reply,
15:11:18 20 which takes about 30 days or a month.

15:11:21 21 So if you're looking at a dispositive motions
15:11:22 22 deadline of late July, I won't be looking at your motions until
15:11:25 23 late August. And, then, for all of the reasons that I've told
15:11:28 24 you, I need 90 to 120 days after that to deal with the motions.
15:11:34 25 So, if we go September, October, November, the earliest I would

15:11:41 1 be looking at setting you for final pretrial conference would
15:11:45 2 be in December and a jury trial in January.

15:11:52 3 So I start with the plaintiffs, not because I favor
15:11:55 4 the plaintiffs but I read from top to bottom and they come
15:11:59 5 above the "v," so that's an easy default. And I'm not trying
15:12:05 6 to slot you in December-January. I can go later than that, I
15:12:09 7 just can't go earlier than that for the reasons that I've
15:12:12 8 stated. So now is the time to think about your next winter's
15:12:15 9 docket. Don't forget your nonrefundable airline tickets for
15:12:24 10 the ski trips to Austria that you have scheduled for next
15:12:28 11 winter.

15:12:28 12 So I'll start with plaintiffs. How do you-all feel
15:12:29 13 about a December-January, time line to resolve this case?

15:12:35 14 MR. O'BEIRNE: Your Honor, Phillip O'Beirne for
15:12:37 15 Plaintiffs. We're in luck because I haven't scheduled the ski
15:12:40 16 trip yet. We expect to be ready to try the case, and we think,
15:12:44 17 if not sooner, we could be ready December-January.

15:12:48 18 THE COURT: How about the defendants?

15:12:49 19 MR. RAVEL: Your Honor, picking up on what you said
15:12:51 20 about dispositive motions and the magistrate and July 26th,
15:12:56 21 just putting in a minimum number of days, if it goes to
15:13:03 22 Judge Austin, it is unlikely for you to take zero time with
15:13:06 23 them to be done by January, February, maybe even March, because
15:13:13 24 of the two phases.

15:13:15 25 And so we would say, given that that is so and given

15:13:22 1 that you are setting some pretty, plain vanilla two-party cases
15:13:28 2 in April, May, June, that May-ish sounds right, April sounds
15:13:32 3 right, because these will be legitimate motions, if they're
15:13:41 4 filed, given what you've said and given the maturity of the
15:13:45 5 parties. And if we don't get rid of them on summary judgment,
15:13:48 6 we think there will be some impact on the charge, the evidence
15:13:50 7 that the parties are going to want to deal with.

15:13:53 8 So I -- I calculate the earliest time is around my
15:13:57 9 birthday, Ground Hog's Day, that you and Judge Austin would be
15:14:02 10 finished, and I'm building in a little time after that to get
15:14:05 11 us to April-ish.

15:14:08 12 THE COURT: All right. So you're suggesting that we
15:14:11 13 have a March pretrial and trial in April?

15:14:15 14 MR. RAVEL: Kind of at the earliest. And I know that
15:14:17 15 sounds, well, the pigs get fat, and the hogs get slaughtered.

15:14:19 16 THE COURT: Well, there's no earliest or latest
15:14:20 17 because I don't care. I have a lot of flexibility at the
15:14:25 18 beginning of a case. I have much less flexibility at the end
15:14:28 19 of a case. So right now, at this time, you-all pretty much can
15:14:34 20 tell me when you want to try the case and when you want to
15:14:37 21 agree on it, provided it's not earlier than that
15:14:39 22 December-January time line, and then I would be happy to
15:14:46 23 accommodate you there.

15:14:47 24 MR. RAVEL: Well, in these situations, even good
15:14:50 25 lawyers like Dan can plan as far ahead as May. But my twins

15:14:55 1 graduate college on the 18th and 19th, so, if we can avoid that
15:15:00 2 weekend, May works.

15:15:01 3 THE COURT: Everybody talk about it and tell me what
15:15:03 4 you want.

15:15:05 5 MR. BITTING: The other alternative is to back up the
15:15:07 6 dispositive motions deadline. I think we know what additional
15:15:11 7 dispositive motions may be coming.

15:15:14 8 MR. O'BEIRNE: Yeah, Your Honor. From our
15:15:15 9 standpoint, I mean, we think this is a straightforward case and
15:15:18 10 we're seeing in discovery already triable facts. So we may
15:15:21 11 have a motion on an affirmative defense that's been raised.
15:15:24 12 But to your point about narrow the issues of what you're
15:15:27 13 actually going to have legitimate motions about and then get to
15:15:31 14 the trial, you know, as the plaintiffs, we want to be ready to
15:15:34 15 go and we think we can go as soon as possible.

15:15:35 16 THE COURT: I understand that "may have a motion" is
15:15:37 17 just like saying "will have a motion" at this stage in the
15:15:40 18 case.

15:15:40 19 MR. RAVEL: It's not traditional to move an agreed
15:15:45 20 dispositive motions deadline earlier in the initial pretrial.
15:15:48 21 But we came in planning on that, and everything does march up
15:15:53 22 to that, the discovery deadline and the expert discovery
15:15:57 23 deadline. And it's bifurcated here.

15:16:00 24 THE COURT: Well, tell me what you-all can agree on.
15:16:03 25 All I'm looking for is a month for your final pretrial

15:16:06 1 conference and a month for your trial.

15:16:18 2 MR. RAVEL: April to May or May to June?

15:16:18 3 MR. BITTING: I'm fine with either of those.

15:16:18 4 MR. RAVEL: What?

15:16:18 5 MR. BITTING: I'm fine with either of those.

15:16:18 6 THE COURT: If you're going to have discussions you
15:16:19 7 don't want on the record, just tell her you don't want it on
15:16:21 8 the record. You don't have to whisper. She'll get it if you
15:16:27 9 whisper if I tell -- unless I tell her not to put it on the
15:16:28 10 record.

15:16:29 11 MR. HOWENSTINE: I think the issue is that the
15:16:31 12 defendants think sometime in the spring would be appropriate,
15:16:38 13 and my impression is that the plaintiffs do not agree with
15:16:42 14 that.

15:16:42 15 MR. O'BEIRNE: We did our best, Your Honor, before
15:16:44 16 the conference to try to see what we could agree on as far as a
15:16:47 17 schedule and what we thought the case would take, and I think
15:16:50 18 the parties agree the current fact and expert and dispositive
15:16:54 19 motions schedule is fine. And, from our standpoint, as
15:16:58 20 Your Honor already said, 90 to 120 days in excess of that would
15:17:02 21 put us in December and January. We think that's plenty of
15:17:04 22 time. I think that addresses the concerns that counsel is
15:17:07 23 raising. If that's the first time the Court thinks would make
15:17:10 24 sense, we would go for that.

15:17:12 25 MR. RAVEL: The only thing that I think is being

15:17:13 1 missed there is that there is likely going to be a
15:17:15 2 Judge Austin-Judge Yeakel procedure, and that these are not
15:17:18 3 going to be motions that you're going to decide in the first 15
15:17:22 4 days you get them. So I think we have a disagreement.

15:17:24 5 THE COURT: But that's right. But the 90 to 120 days
15:17:30 6 is for me. You plan on your going to trial and, if it goes
15:17:34 7 away because you get a ruling on a dispositive motion somewhere
15:17:38 8 in that 90 to 120 days, so be it. But it's ready to go as soon
15:17:45 9 as I rule on the dispositive motion. I don't share your
15:17:47 10 concern about, you know, even if I send the next round to
15:17:52 11 Judge Austin, it just means that you-all have time to file,
15:17:59 12 which you will, because they're called dispositive motions, so
15:18:01 13 somebody is going to object to the report and recommendation
15:18:05 14 and then I'll go through the record. But that's already kind
15:18:09 15 of built into that 90 to 120 days.

15:18:11 16 MR. RAVEL: So we think the appropriate time is April
15:18:14 17 for May, and they think the appropriate time is what for what?

15:18:18 18 MR. O'BEIRNE: December for January.

15:18:19 19 THE COURT: Well, I'm going to go with December and
15:18:22 20 January if the only argument is you don't think the 90 to 120
15:18:26 21 days from the dispositive motions deadline is adequate time for
15:18:31 22 either me, or me in conjunction with Judge Austin, to get it
15:18:35 23 done. I can be ready to try this case in December.

15:18:42 24 So, you know, unless you have an agreement to the
15:18:44 25 contrary, I'm going to put it on what my usual schedule would

15:18:47 1 be, which is the December-January time line, based on the date
15:18:56 2 you tell me will be the last date that I will get dispositive
15:18:58 3 motions, if I get any, which is July 20th.

15:19:04 4 MR. O'BEIRNE: Plaintiffs share that position,
15:19:05 5 Your Honor.

15:19:05 6 THE COURT: All right. Then that's what we're going
15:19:07 7 to do. I'm not going to kick it off more down the line unless
15:19:11 8 you-all can agree on it. And, since you haven't, you've missed
15:19:14 9 the window of opportunity.

15:19:18 10 All right. So I'm going to schedule you for a final
15:19:20 11 pretrial conference on December the 14th, 2018 at 4 p.m. and a
15:19:32 12 jury trial in January 2019.

15:19:37 13 Now, I'm going to write and talk at the same time
15:19:44 14 here. I'm sure you-all recognize what I'm doing by putting
15:19:51 15 this on my calendar and, in a moment, signing the scheduling
15:19:54 16 order is I'm triggering the filing of all of your pretrial
15:20:03 17 filings that are required of both the local rule and general
15:20:08 18 federal rules of civil procedure. So, if you have not walked
15:20:16 19 through those rules recently, you should do so, so that you
15:20:19 20 have them fixed in your mind, because I'll head off a phone
15:20:25 21 call and tell you: Yes, I do expect you to strictly adhere to
15:20:28 22 those pretrial filing deadlines.

15:20:34 23 And you're going to find that most of what you need
15:20:36 24 to file are found in our local rule CV-16. Some are in other
15:20:41 25 local rules, some are in the general federal rules, but most

15:20:50 1 are in CV-16 and most of the deadlines come 14 days in advance
15:20:53 2 of your final pretrial conference. Some a little before that,
15:20:55 3 some a little later, but most of them are 14 days. And, so, if
15:20:59 4 you have "CV-16" and "14 days" kind of fixed in your mind, you
15:21:06 5 won't be far off.

15:21:14 6 Now, let me say a little bit about your filings. One
15:21:24 7 of the things you have to file is an estimate of how long it
15:21:27 8 will take you to try this case. For some reason lawyers have a
15:21:33 9 hard time understanding -- I'm not suggesting that you-all
15:21:38 10 would fall in that category -- what that rule says. So let me
15:21:41 11 tell you what it means.

15:21:44 12 It doesn't mean that the plaintiff takes a stab at
15:21:48 13 how long the plaintiff thinks it will try the case -- take to
15:21:52 14 try the case and then the defendant takes a stab, and I look at
15:21:55 15 these two disparate numbers and try to figure out what you're
15:22:02 16 really talking about. It doesn't mean that the plaintiff tells
15:22:06 17 me how much time the plaintiff needs for its case and then the
15:22:08 18 defendant tells me how much time it needs. It requires you-all
15:22:11 19 to sit down and talk about this before you do your pretrial
15:22:13 20 filings. What I want is for you to talk about this case and
15:22:17 21 collectively determine how long you think would be a reasonable
15:22:20 22 period of time to allocate to try it.

15:22:23 23 And so I want the same number in both sides' pretrial
15:22:29 24 filings, and I want it to be your estimate of how long it will
15:22:33 25 take to try the entire case from beginning of voir dire to end

15:22:37 1 of closing arguments.

15:22:38 2 Now, that's important because, when you come for your
15:22:41 3 final pretrial conference, we're going to talk about how much
15:22:44 4 time you get to try your case. I will put you on a clock. And
15:22:47 5 there are going to be -- as we discuss how much time you're
15:22:51 6 going to get, there will be three components that I'm going to
15:22:54 7 consider.

15:22:54 8 One is your joint estimate of how long you think it
15:22:57 9 will take to try the case. It's important to me.

15:23:00 10 Secondly, I will have looked at your final pretrial
15:23:04 11 filings, which is why I want everything in timely. And I would
15:23:08 12 have paid particular attention to your final trial pleadings,
15:23:12 13 your exhibit lists, and your witness lists and I would have
15:23:15 14 made some kind of seat-of-my-pants guess as to how complicated
15:23:19 15 I think this case is likely to look to the jury.

15:23:25 16 And then third, and probably most important, is I'm
15:23:28 17 going to look at similar cases in my court that have been well
15:23:35 18 tried and how long they took. I've got some background there
15:23:38 19 because this is a copyright infringement case; it's not like I
15:23:43 20 haven't seen any before. But, when you leave your final
15:23:45 21 pretrial conference, you'll know how much time you get to try
15:23:48 22 your case.

15:23:49 23 Now, let me tell you a few things that will help you
15:23:51 24 in that regard. One, take advantage of our local rule that
15:23:55 25 allows you to stipulate facts. Lawyers can always stipulate to

15:23:59 1 more things than they think they can. And I'm not suggesting
15:24:05 2 that anybody stipulate away something that is important to the
15:24:08 3 outcome of your case. But in every case there are any number
15:24:11 4 of small matters that are susceptible to very easy proof that
15:24:14 5 one side or the other needs to get into the record to preserve
15:24:18 6 the record or protect the record which are not of such a major
15:24:22 7 consequence you're ever going to argue them to the jury. Those
15:24:25 8 are things you ought to stipulate to. Those little things will
15:24:28 9 add up and will save you a lot of time on your clock, because
15:24:33 10 I'll read your stipulated facts to the jury at the beginning of
15:24:36 11 trial before the clock goes on and they will already be in
15:24:39 12 evidence, so you're not going to have to go about proving them
15:24:42 13 all over again.

15:24:43 14 Also, sit down with one another before your final
15:24:50 15 pretrial conference and go over your exhibits and exhibit
15:24:53 16 lists. And, to the extent you know that your opponent is going
15:24:55 17 to be clever enough to get an exhibit into evidence, don't have
15:24:57 18 an objection to it. You're not bound by it just because it's
15:25:01 19 in evidence. You can argue its weight all you want, but you
15:25:04 20 will save yourself untold amounts of time if you don't require
15:25:09 21 each other to sponsor every exhibit in front of a witness,
15:25:14 22 particularly, those that you know that you're not going to
15:25:16 23 object to. So do that.

15:25:19 24 Don't do anything fancy on this. Don't renumber your
15:25:21 25 exhibits and give me a new list that says "agreed exhibits" and

15:25:24 1 "objected-to exhibits." You don't need to run it through a
15:25:27 2 word processor. Don't prefile anything.

15:25:30 3 One of you just take notes when you're having your
15:25:32 4 conversation. And then at the final pretrial conference, just
15:25:37 5 bring me a note that can be handwritten that says, "Plaintiff
15:25:40 6 has no objection to the admissibility of the following
15:25:43 7 Defendant's exhibits," and just give me the numbers of them.
15:25:47 8 You don't even have to describe them. And the next line will
15:25:50 9 be, "Defendant has no objection to the admissibility of the
15:25:53 10 following Plaintiff's exhibits," and give me the numbers. And
15:25:57 11 I will admit those exhibits *en masse* at the beginning of trial,
15:26:00 12 and it will save you a lot of time.

15:26:02 13 Now, here's the biggest thing. You need to listen up
15:26:07 14 right now because it's very important, and it's something
15:26:08 15 you're not going to find written down anywhere because I've
15:26:12 16 never gotten around to doing a standing order on it.

15:26:15 17 But the rules provide that each side will provide its
15:26:19 18 proposed findings of fact and conclusions of law -- pardon
15:26:24 19 me -- I mean, jury instructions and questions 14 days in
15:26:28 20 advance of your final pretrial conference and you do it
15:26:32 21 separately. The change is: I want an agreed charge in this
15:26:36 22 case 14 days before your final pretrial conference.

15:26:39 23 Now, it's a copyright infringement case. There's a
15:26:43 24 lot of charge materials out there. I feel like all of you
15:26:45 25 undoubtedly have many of them in your files at your law firms.

15:26:51 1 There's any number of pattern jury charges out there. The
15:26:54 2 easiest thing we should have to do in this case is to decide
15:26:57 3 how we're going to get it to the jury.

15:26:59 4 You're in federal court; you're not in state court.
15:27:02 5 There's not a charge "gotcha" practice. You can go into any
15:27:06 6 lawyer's law firm library that still has books and randomly
15:27:09 7 select a year, and you're going to find many, many fewer charge
15:27:15 8 cases in the entire Federal Reporter system for all of the
15:27:18 9 circuits for any year than you're going to find in the Texas
15:27:21 10 cases in state court. Very few federal civil cases get to a
15:27:28 11 circuit on charge error. It's a really high bar.

15:27:32 12 The standard in the Fifth Circuit is there must be
15:27:37 13 ineradicable evidence that I have erred in submitting my
15:27:40 14 charge. I submit to you that is a high bar. If you can even
15:27:43 15 pronounce the word, it's a high bar. So I'm not too concerned
15:27:51 16 about charge error; neither should you be. So start working on
15:27:54 17 your charge early. The next year is going to go by quickly.

15:27:57 18 I always learned as a young lawyer that the first
15:28:01 19 thing you do when you get a case is to prepare the charge and
15:28:04 20 then you can adjust it as you go along, but it gives you a good
15:28:08 21 road map as to what you're going to do. I feel certain that at
15:28:11 22 least some of you received that same training, and I also feel
15:28:15 23 certain that, like me, you've never done that a single time in
15:28:18 24 a jury case you ever had. But it doesn't mean that it was not
15:28:23 25 good advice when you got it.

15:28:25 1 But don't put it off. Get started on it. Start
15:28:27 2 exchanging your charge materials now, because I'm quite serious
15:28:34 3 that we have this done before trial.

15:28:35 4 Now, I don't do this to give you busy work. I do it
15:28:38 5 for two reasons. One is, once both sides have rested and
15:28:44 6 closed, I don't like to keep jurors cooling their heels while
15:28:47 7 we spend very much time on a charge; and, secondly, I do charge
15:28:50 8 my juries before you argue. So the earliest that I can get the
15:28:55 9 charge in your hands that looks pretty much like the one I'm
15:28:57 10 going to submit, the easier it is on you.

15:29:00 11 In the off chance that you cannot agree to
15:29:02 12 everything, questions and instructions, then I want what you
15:29:07 13 can agree on in agreed form and I want your areas of
15:29:11 14 disagreement, with specificity. And I mean specificity. I
15:29:17 15 want to know everything about your disagreement, and I want
15:29:20 16 both sides' positions supported by authorities. You don't have
15:29:23 17 to give me authorities on what you agree on. But I really
15:29:26 18 don't think we're going to get that far, and I'll be
15:29:29 19 disappointed if we do.

15:29:30 20 Now, that having been said, you can change any date
15:29:34 21 in this scheduling order by agreement except for your final
15:29:38 22 pretrial conference date and time and your trial month. And by
15:29:42 23 agreement, I mean agreement. It's the only way you can change
15:29:45 24 it. I don't want to see a motion for additional time. I don't
15:29:49 25 want to see a motion to modify the scheduling order. In fact,

15:29:53 1 even if you disagree, I don't want to see a motion. I have
15:29:56 2 better things to do than micromanage you. If you need to
15:30:00 3 change some of these dates within the scheduling order, just do
15:30:04 4 it by agreement.

15:30:06 5 I expect you-all to demean yourselves like the
15:30:09 6 professionals you are and to make reasonable accommodation to
15:30:12 7 one another to get this case moved along.

15:30:14 8 Let me caution you about a couple of things, though.
15:30:18 9 If you think you have an agreement, be sure you have an
15:30:20 10 agreement. I'm not going to get into a he said, she said. If
15:30:24 11 there is a disagreement over an agreement, the dates in the
15:30:28 12 scheduling order are going to control.

15:30:30 13 Secondly, if you truly believe that you can get a
15:30:33 14 dispositive motion granted, another round of them, it's not a
15:30:40 15 good idea to change your dispositive motions deadline. I'm not
15:30:43 16 going to tell you you can't do it, but I need all of the time
15:30:45 17 for all of the reasons that I've told you to deal with
15:30:48 18 dispositive motions.

15:30:49 19 And so be forewarned that, if you change that date,
15:30:55 20 the closer you move it to your trial month, the less likely you
15:30:58 21 are I will take up your dispositive motions prior to trial and
15:31:03 22 the more likely you are I will carry them through trial.
15:31:07 23 Because, if you move that date and I don't get to your
15:31:08 24 dispositive motions, I'm not going to put your trial off so I
15:31:11 25 can get to them.

15:31:12 1 Also, if you intend to call expert witnesses, it's
15:31:17 2 not a good idea to change your expert witness date, which is
15:31:21 3 those dates to designate experts, exchange reports, take expert
15:31:25 4 depositions, and to file your Rule 702 or *Daubert* motions.

15:31:29 5 Again, I'm not going to tell you you can't do it; but
15:31:32 6 I like to deal with objections to experts early on so, if I
15:31:38 7 sustain one and strike your expert, you have time to file a
15:31:41 8 motion to try to convince me to let you designate a new expert.
15:31:45 9 There's no guarantee that I'm going to grant that motion, but I
15:31:48 10 like to give you that opportunity. If I'm dealing with Rule
15:31:50 11 702 or *Daubert* motions just before trial and I grant one,
15:31:56 12 you're just out of luck because, again, I'm not going to put
15:31:59 13 your trial off to let you seek a new expert.

15:32:02 14 On the question of experts, do not put anything in a
15:32:07 15 motion in limine about an expert. Objections to experts in
15:32:10 16 motions in limine come way too late in the case, and I'm not
15:32:13 17 going to consider them. If you've got a problem with your
15:32:18 18 opponent's expert, as soon as you know you have that problem,
15:32:21 19 get a motion out on the table and I will deal with it.

15:32:24 20 And on the topic of motions in limine, do not submit
15:32:29 21 me lengthy motions in limine. Lawyers have gotten way too
15:32:32 22 proud of the motion in limine that lives in their word
15:32:34 23 processor and gets bigger and fatter with every case that they
15:32:37 24 try.

15:32:37 25 The sole purpose of a motion in limine is to exclude

15:32:43 1 testimony and questions that are so highly inflammatory or
15:32:45 2 prejudicial they can't be cured by an objection or instruction
15:32:48 3 to disregard. I have yet to see the case that has more than
15:32:54 4 two or, at the outside, three of those highly inflammatory or
15:32:57 5 prejudicial matters.

15:32:58 6 So don't give me motions in limine that have
15:33:01 7 paragraphs in them that say things like, "Don't let my opponent
15:33:04 8 call witnesses that aren't on the witness list"; "Don't let my
15:33:07 9 opponent ask questions that would elicit hearsay"; "Don't let
15:33:11 10 my opponent ask questions about matters that haven't been
15:33:13 11 pleaded."

15:33:17 12 Ninety-nine percent of what I see in motions in
15:33:19 13 limine don't have any place in a motion in limine. So limit
15:33:22 14 your motions in limine to only those highly or prejudicial
15:33:25 15 matters -- highly prejudicial matters or inflammatory matters
15:33:31 16 that can't be cured by an objection or instruction to
15:33:33 17 disregard.

15:33:34 18 If I see a lengthy motion in limine -- one of those
15:33:37 19 10-, 15-, 20-paragraph motions -- I'm not going to read it.
15:33:40 20 I'm just going to overrule the entire thing, and your good
15:33:44 21 stuff that may be hidden in there gets thrown out with your bad
15:33:47 22 stuff and we'll take everything up in front of the jury as it
15:33:51 23 progresses. So restrict your motions in limine.

15:33:54 24 Now, I think you can tell that my rules are pretty
15:33:57 25 straightforward. In addition to making reasonable

15:33:59 1 accommodation to one another and demeaning yourselves like the
15:34:02 2 professionals you are, you need to understand that you only
15:34:06 3 have one role in this case, and that's to resolve it. And you
15:34:10 4 can do it in one of three ways: You could settle it or I could
15:34:14 5 grant a well-taken dispositive motion -- just because I don't
15:34:19 6 like them, doesn't mean that I don't consider them, and it
15:34:21 7 doesn't mean that I don't grant them when they are well
15:34:24 8 taken -- or you can try the case.

15:34:25 9 And I don't care which of the three it is. I like to
15:34:28 10 try lawsuits. I'm not going to get you in here for your final
15:34:32 11 pretrial conference and knock you around about why you haven't
15:34:35 12 settled and try to talk you out of your trial. I will ask you
15:34:38 13 if you've made a good-faith effort to settle this case and, in
15:34:42 14 your best professional judgment, it can't be settled. And your
15:34:45 15 answer needs to be "yes," because settlement is generally in
15:34:48 16 the best interest of the client because it changes the unknown
15:34:51 17 for the known.

15:34:52 18 But I was on your side of the bench long enough to
15:34:55 19 know that every case can't be settled. So if you just give me
15:34:59 20 your assurances that you've made that good-faith effort and it
15:35:03 21 can't be settled, I'm going take you at your word and we'll go
15:35:07 22 to trial.

15:35:07 23 So another reason I conduct these conferences is I
15:35:11 24 like to get the lawyers together before too much water has gone
15:35:14 25 under the bridge to find out if you have any questions about me

15:35:19 1 or my staff or the way I run my court, anything that might be
15:35:22 2 helpful to you, anything that can make your life easier between
15:35:27 3 now and the end of trial.

15:35:30 4 I start with the plaintiffs. So does the plaintiff
15:35:34 5 have any questions, anything I've left out, anything you-all
15:35:37 6 want to know?

15:35:39 7 MR. O'BEIRNE: Your Honor, there is a lot in here,
15:35:41 8 Your Honor, for us to keep in mind and we really appreciate you
15:35:44 9 laying this out with such clarity. I think, you know ...

15:35:46 10 MR. BITTING: Do you -- Judge, do you have policies
15:35:49 11 on contacting the law clerk on this case?

15:35:51 12 THE COURT: Yeah. I don't have any problem with it.
15:35:53 13 The law clerk on your case is Katherine Baffes, B-a-f-f-e-s.
15:35:57 14 You may call her or any of my clerks and ask them routine
15:36:03 15 questions, procedural questions, the way we like to see things.

15:36:07 16 Do not *ex parte* her or any of my clerks. And you
15:36:10 17 don't need my lecture what *ex parte*-ing is. If you do, you can
15:36:14 18 get put on the "may not call chambers list." And I've now been
15:36:18 19 doing this for a little over 14 years, and nobody has gotten on
15:36:21 20 that list. So if you've always aspired to be first at
15:36:24 21 anything, just overstay your welcome with my law clerks --
15:36:28 22 because, amazingly, they tell me about your conversations and I
15:36:31 23 know what you've asked them or tried to do with them -- and I
15:36:34 24 can accommodate you by putting your number on that list.

15:36:41 25 I know I have colleagues that don't allow calls to

15:36:44 1 chambers, and I've never understood that -- I think they must
15:36:45 2 have too much free time on their hands -- because it's just
15:36:48 3 easier, if you have a routine question about the form of
15:36:49 4 something or the way we like to see something, if you can just
15:36:54 5 call and get your question answered.

15:36:56 6 MR. RAVEL: I have one, Judge.

15:36:57 7 THE COURT: All right.

15:36:58 8 MR. RAVEL: To help me do my job of telling people
15:37:02 9 who I represent how you feel about dispositive motions, what
15:37:07 10 has become of the Tennessee Orange "No Smoking. No Dispositive
15:37:12 11 Motions" placard?

15:37:14 12 THE COURT: It's right behind you.

15:37:14 13 MR. RAVEL: Oh, okay. All right. Thank you.

15:37:17 14 THE COURT: See you just took the wrong chair. That
15:37:20 15 was given to me by previous court reporter who had heard --
15:37:23 16 Arlinda is still figuring out what she's going to give me --
15:37:27 17 that heard my lectures so much about this, that that came up.
15:37:29 18 So it's there. It is alive and well.

15:37:35 19 MR. RAVEL: Would it violate the local rules if I
15:37:38 20 took a snapshot of it before I left?

15:37:41 21 THE COURT: You may do that.

15:37:41 22 MR. RAVEL: Thank you, Judge.

15:37:41 23 THE COURT: Any other questions?

15:37:42 24 MR. HOWENSTINE: No. Thank you, Your Honor. I think
15:37:43 25 you've covered everything we might ask.

15:37:45 1 THE COURT: If you don't settle and if you don't
15:37:47 2 consent to a magistrate judge, I look forward to having you
15:37:50 3 back here in a year and trying a lawsuit with you.
0:0:0 4 (End of transcript)

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1 UNITED STATES DISTRICT COURT)

2 WESTERN DISTRICT OF TEXAS)

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
5 that the foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with
8 those prescribed by the Court and Judicial Conference of the
9 United States.

10 WITNESS MY OFFICIAL HAND this the 15th day of
11 February 2018.

12

13 /S/ Arlinda Rodriguez
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